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1 because they didn't always make the hearings available by
2 teleconference. If they were available by teleconference
3 I was generally available as a resource. If they were
4 not, I was on hand should someone have a question to call
5 about.
6 Q All right, you work out of Anchorage, right?
7 A Correct.
8 Q You get lots of phone calls from Juneau?
9 A Less and less these days.
10 Q All right. Would it be reasonably for an employer to --
11 Well, is there such a thing as a nonwritten wage and hour
12 opinion concerning exempt and nonexempt status for
13 overtime?
14 A It's possible to call up, I suppose, and talk with an
15 investigator, or even myself, kind of colloquially about a
16 circumstance. And it happens very frequently. I'll get
17 calls from attorneys that say, well, this is what I have
18 and I'd just like to feel you out and find out what you
19 think about this before I go to the problem of writing a
20 letter and charging my client for the time, so let me know
21 what you think. And we'll discuss it and bounce things
22 back and forth and I'll -- they'll play what if, and I'll
23 say if then, and -- and at the end of the conversation
24 they usually say, well, let me think about it, or, I'll
25 write you a letter and we'll reduce this to writing 'cause

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1 I think I want a formal opinion letter on this. Or
2 they'll say, well, let me talk to my client and see if
3 they want a formal opinion letter on this.
4 Q Okay, so not meaning to be obstreperous here, but then is
5 the answer to my question, yes, there is an opinion other
6 than a written opinion?
7 A Well, I guess I didn't complete my answer. I would not --
8 and try to convey to whoever I'm talking to that that
9 verbal discourse is not a formal Department opinion
10 because until I see the facts as they're going to
11 represent them to me in writing, anything I say is nothing
12 more than just theoretical.
13 Q Okay. Turning to this particular case here, first of all,
14 just so you understand, I think you do, but the materials
15 supervisor isn't the job in question here, it's a position
16 called safety specialist. Do you recollect in this time
17 frame of whatever it is, June of '96, having -- or,
18 rendering what might be called an oral opinion concerning
19 a safety specialist position to Mr. Mark Nelson?
20 A No, I'm sorry. I deal with hundreds of calls a year and a
21 lot of them deal with this kind of issue because the --
22 the opinion letters are almost solely my domain. So I --
23 I certainly don't recall a conversation of that nature.
24 Q Okay. Would it be reasonable for an employer to rely upon
25 a what might be called oral opinion from you in saying a

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1 position is or isn't exempt and then pay the employee
2 accordingly?
3 MR. YOUNGMUN: Object, calls for a legal conclusion.
4 Q You can go ahead and answer.
5 A I think it would be at some risk to do so, which is why we
6 try to make it very clear when we have -- both me and my
7 staff, when we have these conversations that, you know,
8 this is only based on what we're talking about and right
9 now we're just talking 'cause I don't know what the facts
10 are. And I won't give you a formal opinion. My practice
11 is to say I won't give you a formal opinion until I see it
12 in writing. Because I've had instances where people have
13 turned around and I hear it coming back at me years later,
14 well, so and so told me that this was so. Well, I may
15 have told you that, but my recollection of the facts or my
16 notes indicate that they're not the facts that we have
17 before us today. So in some circumstances where I've
18 been, I feel, misquoted or quoted out of context in
19 discussions of these natures, it's been my practice to
20 say, you know, if you want it in writing, if you want to
21 formalize this opinion to have something -- particularly
22 since the amendment to the liquidated damages statute. If
23 you want to have something that you can take to court and
24 use as a defense, then it'll only be a formal opinion
25 letter and you only get that when you put in writing and

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1 give me your facts.
2 Q Okay. Does the Department of Labor from time to time do
3 workshops for employee -- employers?
4 A Yes.
5 Q All right, are some of the issues addressed there exempt/
6 nonexempt status?
7 A Yes.
8 Q Okay, and do you conduct those?
9 A I do, and some members of my staff do.
10 Q Okay, do you ever suggest to employers who are seeking
11 wage and hour opinions that they seek the advice of legal
12 counsel?
13 A Yes.
14 Q Is that something you do regularly?
15 A Yeah, I think that's generally a part of our patter, along
16 with saying if you want -- if you have a situation that
17 you want formal -- a formal opinion from the Department
18 on, this is how you go about getting it. And other
19 circumstance -- it depends upon how the question is posed,
20 but very frequently I will refer people to legal counsel,
21 advise them to find a good competent employment law
22 attorney.
23 Q Okay. Your prior testimony indicated that you wanted to
24 have writings from the employer describing the job in
25 order to do a WHOL. Do you require the employer to give

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1 you some type of verity to that? In other words, give you
 2 a sworn statement saying this is what the job and the job
 3 duties?
 4 A No. Our opinion is -- that's why our opinions in writing
 5 are based on those documents. And if they -- they turn
 6 out to be wrong, it's their problem to deal with because
 7 we're asking them for facts.
 8 Q Okay. Do you have any written guidelines as to how each
 9 letter inquiry about wage and hour classification is
 10 supposed to be researched issue -- researched and then
 11 issued?
 12 A No.
 13 Q And who can ask for a wage and hour opinion letter?
 14 A Anybody can, an attorney, an employer, an employee.
 15 Q Union?
 16 A Union.
 17 Q Schoolkid?
 18 A (Witness nods affirmatively)
 19 Q And when you or -- and/or others who may do this, draft
 20 these WHOLs, do they confer regularly or ever with an
 21 attorney general in the Department of Law?
 22 A Occasionally, if it's an issue that we may not have --
 23 have had any history with, or if it's an issue dealing
 24 with a new variation of the law, either through a court
 25 interpretation or perhaps a newly written statute.

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1 Q Does the attorney -- are you familiar with attorney
 2 general opinions?
 3 A Yes.
 4 Q Does the attorney general ever issue opinions that concern
 5 Department of -- well, in a broad sense let me ask you
 6 first, Department of Labor issues?
 7 A Yes.
 8 Q Okay, could you give me a couple examples?
 9 A Oh, about 1982 when the intertie was just getting started
 10 between Anchorage and Fairbanks, our attorney general then
 11 was -- our assistant attorney general assigned to the
 12 Department was Robert Landau and he issued a lengthy
 13 opinion on the coverage of Title 36, which is the public
 14 contracts law, to that particular project.
 15 Q Okay, are there any that you're aware that deal with
 16 exemption issues?
 17 A I'm not aware of any formal attorney general opinions that
 18 are numbered and archived in the AG's office that deal
 19 with those issues, but we have received memoranda over the
 20 years. My file of attorney general opinions goes --
 21 contains documents back to the '60s. And I know that
 22 we've received informal advice in the form of memoranda
 23 that we colloquially in the office refer to as AG
 24 opinions, but they're not issued over the AG's signature.
 25 the Attorney General signatures. They're a memorandum

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1 from an assistant AG saying such and so would be the case.
 2 And I know we have received issue -- opinions on those on
 3 occasion. One that comes to mind dealt with helicopter
 4 pilots and the professional exemptions.
 5 Q Is it Daboff v. Tactical Helicopter (ph)?
 6 A Actually it precedes Daboff by about 10 years.
 7 Q And those opinions are internal to the Department, then,
 8 or are they available somehow, if you know?
 9 A A little bit of yes on both of those, but some have been
 10 fashioned as attorney/client privilege and so would not be
 11 generally available to the public.
 12 Q As far as being available to an individual or company to
 13 rely upon as authority for their action in regarding
 14 asserting a position to be exempt or nonexempt, which
 15 carries more weight, an attorney general opinion or a
 16 WHOL?
 17 A If you had two existing....
 18 MR. YOUNGMAN: Just pose an objection that it calls for
 19 speculation and a legal conclusion.
 20 Q Okay, you can answer.
 21 A If you had two existing at the same time on the same
 22 subject, one from the AG's office to us and one from us to
 23 an employer, there would have to be a reason for the
 24 difference in the opinions. If -- if we had received an
 25 AG opinion that said in our opinion this position is not

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1 exempt, and the Department after receipt of that and
 2 knowledge of that issued an opinion saying in our belief
 3 it is exempt and here's an opinion letter -- and, by the
 4 way, I don't know if that circumstance ever occurred --
 5 there would've been a policy call made at a desk higher
 6 than mine.
 7 Q Okay, let me ask you this question. If you have an
 8 attorney general opinion saying this particular position
 9 is exempt and then an employer inquires of you concerning
 10 that position, is it your policy to follow the attorney
 11 general's decision?
 12 A Absent some guidance otherwise from my superiors, yes,
 13 that would be the case.
 14 Q As far as the availability of these resource documents
 15 we've been talking about, if they're available to the
 16 public are they listed on the web?
 17 A No.
 18 Q They're generally not?
 19 A No, what I refer to when I use the term AG opinions is
 20 actually a body of documents that's everything -- that
 21 includes everything from what preceded the modern-day wage
 22 and hour policy letter, policy letters from management
 23 above my level in the 20 years before I came to the
 24 Department that were gathered together when we started
 25 maintaining some reference documents to informal AG

1 advisory memos as I've discussed to formal numbered AG
 2 opinions over the Attorney General's signature to court
 3 decisions. And the court decisions could be U. S. Supreme
 4 Court, State Supreme Court, Federal District Court,
 5 depending upon the type of issue that has come up. So
 6 it's a rather -- I think there's three three-inch binders
 7 of this stuff that's been maintained chronologically by
 8 year, and it -- mostly it's internal reference and
 9 historical reference to see where we were and are we still
 10 there or if we're not there any longer why has it changed.
 11 Q Have you ever testified in court regarding issues
 12 concerning wage and hour?
 13 A Yes.
 14 Q All right, how many times? Roughly.
 15 A Half a dozen.
 16 Q And have you -- and doing that have you ever been
 17 qualified as an expert witness?
 18 A Yes.
 19 Q And in regard to what issues?
 20 A Interpretation of wage and hour law and regulations and
 21 application of those to a given set of facts.
 22 Q And can you name some of the case names and judges, if you
 23 have some?
 24 A I believe -- I testified in a case before Judge -- then
 25 Judge Fabe that involved a travel agency on the North

1 Q Anchorage.
 2 A All of those were Anchorage court cases.
 3 Q Okay, in regard to any conversation you might have had
 4 with Mark Nelson back in 1996 or thereabouts....
 5 A '97?
 6 Q '97, if he did speak -- I'm going to withdraw that
 7 question.
 8 MR. COVELL: Why don't we go off record for just a second,
 9 I think I'm done, and then Mr. Youngmun likely will have some
 10 questions for you.
 11 (OFF THE RECORD)
 12 (ON THE RECORD)
 13 Q In regard to your -- the June 25th letter from Mr. Nelson
 14 to you -- let me withdraw that. You have the June 25th
 15 letter, the June 19th letter and your letter of June 25.
 16 A 26.
 17 Q 26, thank -- well, dictated June 25....
 18 A Dictated on the 25th.
 19 QI'm sorry. And, okay, and there's the June 26th.
 20 Okay, well, that may answer my question right there. If -
 21 - What I'm trying to ascertain is if you can tell me by
 22 looking at the documents if your letter of June 25/26 is
 23 in response to both his June 19 and June 25 letter or not?
 24 A It probably is, and the reason I say that is in reviewing
 25 the documents, and particularly my response to the June 19

1 Slope, and the name of the company was an acronym of
 2 letters that doesn't make any sense to me, but it was like
 3 ENWC, I think, or something like that. And they were the
 4 defendant in an overtime case. I believe I testified in a
 5 case involving Delta Western out in the Aleutian Chain,
 6 Unalaska. I testified -- no, I did not testify. I was
 7 excused by the judge in the Barrios case on the North
 8 Slope, B-A-R-R-I-O-S, which eventually went to the Supreme
 9 Court. I was qualified as an expert witness but the
 10 questions that were being posed were objected to in the
 11 terms of asking me to make a conclusion of law and the
 12 judge determined that he could do that himself without my
 13 help, thank you.
 14 Q As judges will do.
 15 A Oh, yes, they're aggravating when they do that. Those are
 16 three that come to mind. I know that there have been
 17 others.
 18 Q Okay, do you know if the trial -- like the Delta Western
 19 case, do you know if that was an Anchorage case as opposed
 20 to a Bethel case?
 21 A I believe Delta Western was Anchorage.
 22 Q All right, and do you know if State or federal court?
 23 A State.
 24 Q And then the Barrios case was?
 25 A State court. Anchorage.

1 letter, I can see what more than likely happened here was
 2 that he was asking a question about a really craftily
 3 unique area of the law in the supervisory exemption, and I
 4 knew he wanted to find out about the exempt status but I
 5 was not sure that he understood the implications with
 6 regard to all hours worked. So I -- I believe that I
 7 called him, initiated a phone call, discussed those
 8 issues, asked some more questions, explained exactly what
 9 the differences were and what the pitfalls were here, and
 10 as a result of that call he then faxed over the June 25th
 11 letter, which means I probably called him early in the
 12 morning on the 25th, this was sent over on -- 9:30 on the
 13 25th, and upon receipt of that later that day I dictated
 14 the letter that we have as wage and hour opinion letter
 15 122.
 16 Q Okay, and looking at the fax imprint on top of the June
 17 25th letter, you -- that indicates it's sent at 10:34 on
 18 the -- June 25, '97?
 19 A Correct.
 20 Q And then which one of these two letters -- excuse me, the
 21 June 19 letter was the one with the attachments, is that
 22 right?
 23 A Correct.
 24 Q Okay. And then so it makes sense, then, at the conclusion
 25 of your conversation on the morning of the 25th you would

1 dictate your June 26 letter while it's fresh in your mind?

2 A Yes.

3 MR. COVELL: That's all I have.

4 MR. YOUNGMUN: Could we take about a five-minute break?

5 MR. YOUNGMUN: Sure.

6 (OFF THE RECORD)

7 (ON THE RECORD)

8 BY MR. COVELL:

9 Q Good morning, Mr. Carr, my name is Greg Youngmun, I

10 represent APC Natchiq in this case, and I just have some

11 follow-up questions. You indicated in your testimony that

12 you frequently -- you or other staff members in your

13 office would frequently give out oral opinions on whether

14 or not a particular position was exempt or nonexempt, is

15 that right?

16 A To make that absolutely accurate -- I may have said, but

17 what I want to convey here is I have three regional

18 offices and depending upon where the call comes in,

19 whoever takes that call will talk to people and answer

20 their questions and give a little repartee back and forth

21 about this is what the law requires and if you have this

22 then that might be the case, but to my knowledge all of my

23 field folks are going to say "but if you want a formal

24 opinion from the Department you need to put it in writing

25 and send it to Randy Carr."

1 Q I understand that's the process if you want a formal

2 opinion, but if I understand your testimony you indicated

3 that you yourself would frequently provide an oral opinion

4 on the exempt status of a particular position, is that

5 right?

6 A Um-hm.

7 Q Now, when you would provide an oral opinion to an employer

8 on the exempt status of a particular position, would you

9 keep any written record or notes of that discussion?

10 A No.

11 Q Do you know whether any of your staff members would keep

12 notes of a discussion where they rendered an oral opinion

13 on the exempt status of a particular position?

14 A I don't think they would, 'cause I don't think my staff

15 would really characterize it as an opinion. You know, I

16 think there would always be that caveat, "that sounds like

17 it might be, but".

18 Q Okay, now, do you know Mark Nelson?

19 A I've met him again today and he represents that we've met

20 before, but I -- I don't recall.

21 Q Do you have any recollection of any telephone discussions

22 with Mr. Nelson?

23 A No specific recollections. I can -- as I testified

24 earlier, I believe I can reconstruct that we had some

25 telephone conversations relative to this -- these

1 documents before us today, but I don't recall the

2 conversation verbatim by any stretch of the imagination.

3 Q Okay, so you don't have any specific recollection of

4 telephone discussions with Mr. Nelson about this materials

5 supervisor position which is the subject of the Exhibits

6 to your deposition?

7 A Other than I know that we -- that I would've called him

8 because the uniqueness of the supervisory position and the

9 issues that his inquiry presented would've given me enough

10 concern that I wanted to talk with him and make sure he

11 understood the other obligations outside of the overtime

12 implications for his letter.

13 Q But you don't have any specific recollection of that

14 discussion?

15 A No.

16 Q And I think you indicated that you don't have a

17 recollection of any discussions with Mr. Nelson relating

18 to a safety specialist position back in this spring or

19 summer of 1997, is that right?

20 A No, I don't recall any conversation like that.

21 Q It's possible that you did but you just don't recall?

22 A That's correct.

23 Q And if Mr. Nelson were to testify that he had a discussion

24 with you about a variety of positions including the safety

25 specialist position, would you have any reason to doubt

1 his testimony?

2 A No.

3 Q You indicated that these formal opinion letters were --

4 or, was one good way of showing this good faith defense,

5 as I recall. What other ways -- what other things or what

6 other ways can an employer demonstrate this good faith

7 defense, in your opinion?

8 A Of course this is only my opinion, it's not necessarily

9 sure about those five people that wear the black robes and

10 make the big decisions, but if I were brainstorming with

11 someone I would say, well, if you had an opinion from the

12 U. S. Department of Labor that might be useful, although

13 their definitions are different than ours. So it depends

14 upon to some extent what forum the allegations are coming

15 in. Trying to remember the exact testimony with regard to

16 the changes in the liquidated damages statute. It seemed

17 to me that the primary concern was that they wanted to

18 somehow overcome what was -- the perception that a lot of

19 employers would simply say, "well, I didn't know" and try

20 and assert that as an affirmative defense for good faith.

21 And that the best and probably the only substantive way of

22 proving that you in fact have exercised good faith was to

23 show that you had consulted the enforcement authority.

24 Q And when you say consulted with the enforcement authority,

25 what do you mean by that?

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1 A In some manner that the facts of the particular situation
 2 had been conveyed to, in this case, the Department of
 3 Labor, the State Department of Labor, and an opinion
 4 rendered by the State Department of Labor that was then
 5 relied upon and found later by the court to be incorrect.
 6 Q Would this include any oral opinions that you may have
 7 rendered or that somebody in your office may have
 8 rendered?
 9 A My recollection of the testimony was that the -- and
 10 again, this was not my testimony but I was present at the
 11 hearings, or present at the telecommunication conferences
 12 for the hearings, and I believe there was an attorney
 13 there -- I'll think of his name as I'm talking here.
 14 There was an attorney who was testifying as to this issue
 15 and my recollection was that he was pointing out to the
 16 committee that the Department of Labor issued formal
 17 written wage and hour opinions to anyone who -- who
 18 required them if they would simply go through this
 19 process, and that that would be an excellent method of
 20 establishing that they've gone through the steps to show
 21 that they were trying to do what was right.
 22 Q Are there other steps an employer can go through....
 23 A I suppose they can contact an attorney and they could get
 24 the attorney to write them an opinion. That's untested
 25 yet as far as I know as to whether the court would find

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1 that to be good faith.
 2 Q Any other thing -- Any other ways or things that you can
 3 think of that would be prudent for an employer to do to
 4 determine whether or not a position is exempt or
 5 nonexempt?
 6 A Well, certainly I suppose it goes without saying that just
 7 to simply ask the Department of Labor in a conversational
 8 manner, a telephone call, here's what I've got, what do
 9 you think, but the problem that I see that presenting is
 10 apparently what's before us here today is that when
 11 everything's oral there are -- there's no promises that
 12 that's going to be binding. The Department certainly
 13 would not feel bound by incorrect or incomplete or
 14 inaccurate advice given by one of our staff to a set of
 15 facts that may or may not be proven to be accurate later
 16 on down the road. If a case came forward, a claim were
 17 filed with us, we would pursue it unless we had an opinion
 18 on those facts in writing that said this -- this is in
 19 fact what the Department's opinion is. And then we would
 20 have to make sure that the -- of course, the status of the
 21 law hadn't changed. That's one of the serious flaws with
 22 the opinion letter system and one that we recognized when
 23 we initiated it was that it only establishes that snapshot
 24 in time, and as soon as these documents start becoming
 25 formalized and become available to the public, someone

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1 who's not doing due diligence can grab an opinion letter
 2 from six years ago and say, well, this is the Department's
 3 opinion, I'm relying on this, without bringing it forward
 4 and shepherdizing it, if you will, with the Department's
 5 records to insure that it's still an accurate opinion
 6 today. And that's -- that's a concern, but we've been
 7 more or less compelled to make them available, they are
 8 public records. Have to make them available to the public
 9 but we try at every corner to assure that whoever's
 10 accessing them has that caveat that you need to make sure
 11 that what you're relying on is the current status of the
 12 law or the current opinion.
 13 Q Now, correct me if I'm wrong, but it's my understanding
 14 that these -- these opinion letters might ultimately turn
 15 out not to be true, is that right?
 16 A It could be. An example that comes to mind is -- I'm not
 17 positive but I wouldn't be at all surprised to find a few
 18 opinion letters in the early records dealing with return
 19 transportation costs. The Department had a policy and a
 20 position with regard to what all was incorporated into
 21 calculating return transportation costs, and in the early
 22 '80s, about 1983, 1984, those aforementioned five people
 23 that wear the black robes disagreed with the Department's
 24 opinion and issued a court decision, the finding, in fact,
 25 what those costs -- or, what the transportation costs are,

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1 which was substantially different than what the
 2 Department's previous posture had been.
 3 Q Okay, but in terms of whether these opinion letters are
 4 legally binding, a court could determine that the opinion
 5 letter was legally incorrect, is that right?
 6 A Yes, absolutely.
 7 Q And so these opinion letters are given as guidance to
 8 employers who would request an opinion from the Department
 9 of Labor, correct?
 10 A And they are -- they are given with the understanding that
 11 this is the Department of Labor's position on this issue.
 12 If this fact pattern came before us we would or would not
 13 act on it based on these facts. This is how we would act.
 14 Q So if the Department of Labor, either you or somebody in
 15 your office, gave either a formal written opinion or gave
 16 an oral opinion which an employer relied upon to make its
 17 decision whether a position was exempt or nonexempt, that
 18 didn't necessarily mean that ultimately that position was
 19 exempt or nonexempt if it was determined otherwise by the
 20 court, right?
 21 A That's correct.
 22 Q So if I understand when -- if I understand your testimony,
 23 then, one way to show good faith is to call your office
 24 and ask you about a particular position as to whether it's
 25 exempt or nonexempt, right?

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1 A That would be a -- that would be the very minimum, I would
 2 think. And again, so far that level of good faith
 3 argument hasn't been tested in the courts, to my
 4 knowledge.
 5 Q But you think it'd be prudent -- If an employer had a
 6 question about whether or not a particular position was
 7 exempt or nonexempt, it would be reasonable and prudent
 8 for an employer to contact your office to ask....
 9 A Yes.
 10 Qdon't you think?
 11 A Yes.
 12 Q Would it be reasonable and prudent for the employer to
 13 review federal and State regulations that define the
 14 exempt status to determine whether or not a particular
 15 position is exempt or nonexempt?
 16 A It would be instructive to do both, although in most cases
 17 dealing with the white collar exemptions the State
 18 regulations are going to provide a more stringent
 19 requirement than the federal requirement. So to the
 20 extent that they would expand their understanding of how
 21 the exemption works, looking at the federal guidelines
 22 would be useful. But not necessarily -- in State court,
 23 at least, or under State law not necessarily
 24 determinative.
 25 Q Okay, but you would agree, then, that it would be prudent

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1 for -- reasonable and prudent for an employer to consult
 2 with State regulations on whether or not a particular
 3 position was exempt or nonexempt in Alaska?
 4 A Yes.
 5 Q Would it also be prudent for an employer to consult with
 6 legal and other resources regarding wage and hour
 7 compliance?
 8 A Absolutely.
 9 Q Would it also be prudent for an employer to review the job
 10 description for a particular position in determining
 11 whether or not a position is exempt or nonexempt?
 12 A Yes.
 13 Q Would it also be reasonable and prudent for an employer to
 14 talk to people out in the field that are actually either
 15 performing or observing the performance of duties with
 16 regard to determining whether or not a particular position
 17 is exempt or nonexempt?
 18 A That would be necessary.
 19 Q I was going to ask you about one of the Exhibits.
 20 MR. YOUNGMUN: I'm looking for the....
 21 MR. COVELL: There's a whole clean set here.
 22 MR. YOUNGMUN: Okay.
 23 MR. COVELL: Came into play.
 24 MR. YOUNGMUN: My mind was starting to play tricks on me.
 25 Q Okay, I think this is part of Exhibit 4. Mr. Covell asked

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1 you if you had recognized what appears to be a test for
 2 exemption of employees from the provisions of the Fair
 3 Labor Standards Act for materials supervisors. That
 4 appears to be a form of a checklist, is that right?
 5 A Yes.
 6 Q And I think you indicated that this was a checklist based
 7 on the short test under the Fair Labor Standards Act,
 8 correct?
 9 A Correct. Well, long and short tests both. It contains
 10 both.
 11 Q Okay, so it does contain both the long test and the short
 12 test?
 13 A Correct.
 14 Q Does the State have a checklist type form that is similar
 15 to this document?
 16 A No.
 17 Q And as I recall you testified that you have seen
 18 checklists that are similar in format to this?
 19 A Yes.
 20 Q Just not this particular form?
 21 A I think so.
 22 MR. COVELL: Just for the record, that was Exhibit 4, APC
 23 150, 151 we were talking about.
 24 MR. YOUNGMUN: Correct.
 25 Q I want to make sure I understand your testimony about this

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1 good faith issue. I think you indicated that after the
 2 change in State law in 1999, correct me if I'm wrong, that
 3 you would preface your discussions with persons seeking
 4 information about the exempt status with regard to the
 5 good faith defense that it would prudent to get a formal
 6 opinion letter?
 7 A Actually what I said was that it was -- it's my practice
 8 even prior to that time, but I was particularly sensitized
 9 to it after the change in the statute, because what
 10 happened, as soon as the law changed, we started getting a
 11 lot more requests for opinions. We started getting a lot
 12 of contacts for opinions, telephone calls and so forth.
 13 And in light of the law and in light of the recent
 14 testimony on the statute, it was in the forefront of my
 15 mind that it'd be very crucial to employers to go through
 16 the full step and get a formal opinion from the Department
 17 in writing and give us everything in writing that we can
 18 rule upon. But I was doing that as my general practice
 19 even prior to that.
 20 Q Okay, so with regard to any discussions that you had with
 21 Mr. Nelson back in 1997, at that time Alaska had not
 22 adopted this good faith defense, is that right?
 23 A I'm pretty certain it wasn't in effect then, yes.
 24 Q Mr. Carr, I assume that over the years you had many, many
 25 telephone calls from a variety of people regarding your

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1 views on a particular position as to whether it's exempt
 2 or nonexempt, is that right?
 3 A Yes.
 4 Q And I assume this includes discussions with attorneys?
 5 A Yes.
 6 Q On average can you give me an estimate of how many -- how
 7 many telephone calls a week do you field on exempt-type
 8 questions?
 9 A I'd probably say it's not unusual to get three or four a
 10 week.
 11 Q Three or four a week. And has that generally been the
 12 case since you became the chief of labor standards?
 13 A More so earlier on. As I'm slowing starting to wind down
 14 my career, I'm trying to push more of that off on my
 15 subordinates to give them more exposure and training to
 16 this. But as a general rule these -- those sorts of
 17 activity were gladly pushed uphill to me by my staff.
 18 Q So in that 1996, 1997 time frame when you first became the
 19 chief, then, you would've -- your recollection is that you
 20 would've on an average received more telephone calls from
 21 employers or attorneys than more recently?
 22 A Yes.
 23 Q So you get calls from attorneys about exempt status
 24 questions?
 25 A Yes.

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1 Q And telephone calls from human resource people?
 2 A Yes.
 3 Q Do you get telephone calls from business managers or
 4 business executives?
 5 A Yes.
 6 Q And I assume that one of your functions as the chief of
 7 labor standards is to give -- provide guidance and
 8 education to employers about wage and hour laws, is that
 9 correct?
 10 A Yes.
 11 Q And also with regard to issues that may affect the exempt
 12 status of a particular position, is that also true?
 13 A That's one of the components of our overall body of wage
 14 and hour laws, yes.
 15 Q And so do you -- would you agree that one of your roles as
 16 the chief of labor standards is to coach employers on wage
 17 and hour practices?
 18 A I've not ever really thought of it that way. I guess it
 19 could be characterized in that manner, yes.
 20 Q Okay. And in fact when you talk to employers who may have
 21 questions about whether a position is exempt or nonexempt
 22 do you not try to extract information from employers when
 23 they're asking you questions about the exempt status?
 24 A Yes, I do.
 25 Q And if there's a gray area -- when you talk to an employer

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1 and there's a gray area about whether a particular
 2 position is exempt or nonexempt what types of information
 3 would you ask for?
 4 A Usually what's proffered at the beginning is some
 5 variation of the job description, which I tell folks that
 6 we like to see job descriptions because we enjoy reading
 7 fiction, but what we need is, from someone on the ground,
 8 a detailed explanation of what that job description really
 9 means, and broken down by duty, and then those duties
 10 broken down by time. Particularly important in the white
 11 collar exemptions because of the time element tests.
 12 Q And would it be common to have -- to obtain this type of
 13 information by telephone in discussions with the....
 14 A No.
 15 Qemployer?
 16 A No, when we get into the breaking things down by time, I
 17 -- I will not issue any sort of an opinion on -- well, to
 18 my recollection I don't think I've ever had a case where
 19 people could tell me on telephone how much time they spend
 20 doing this or how much time they spend doing that. They
 21 might hypothesize, let's assume that they're spending 60%
 22 of their time doing this. Well, if in fact they are then
 23 you would meet the standard if it were a retail or service
 24 establishment, for example, where you wouldn't meet the
 25 standard if it wasn't a retail or service establishment

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1 and you were looking at, say, the administrative
 2 exemption. And we can talk about what ifs and if thens,
 3 but it's purely theoretical at that point.
 4 Q Okay, and then if you were asked to render a formal
 5 opinion letter, then you would -- you would follow that up
 6 with a request in writing?
 7 A Yes.
 8 Q With a breakdown of times and duties, correct?
 9 A Yes.
 10 Q Would it be fair to say that sometimes job descriptions
 11 don't mean anything in terms of determining whether or not
 12 a position is exempt or nonexempt?
 13 A I've found that the job description sometimes has very
 14 little relationship to the actual duties being performed.
 15 Q And those would be the occasions where you would follow up
 16 with the employer and ask for additional information about
 17 what was actually being done on the job?
 18 A Yes.
 19 Q Do you do -- I assume that you do training of staff with
 20 the Department of Labor internally?
 21 A Yes.
 22 Q And do you also provide training or educational
 23 opportunities for employers in an external setting?
 24 A Yes.
 25 Q Can you give me some examples of where you might provide